UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 29

IN THE MATTER OF: TRI-MESSINE CONSTRUCTION COMPANY, INC. AND ITS ALTER EGO CALLAHAN PAVING CORP. Respondents and LOCAL 175, UNITED PLANT AND PRODUCTION WORKERS, Charging Party and HIGHWAY, ROAD AND STREET CONSTRUCTION LABORERS LOCAL 1010, LIUNA, AFL-CIO, Party in Interest	Case Nos. 29-CA-194470 Case Nos. 29-CA-206246

RESPONDENTS' REPLY BRIEF IN SUPPORT OF THEIR EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND PROCEEDINGS

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PRELIMINARY STATEMENT

Respondents Tri-Messine Construction Company, Inc. and Callahan Paving Corp. ("Respondents") respectfully submit this reply brief in support of their exceptions to the Administrative Law Judge's decision and proceedings in the above-referenced matter.[1]

POINT I RESPONDENTS' ACTIONS WERE ENTIRELY LAWFUL

Only by ignoring or distorting salient facts and making meaningless or irrelevant distinctions about prior case law (or erroneously claiming that holdings are "dictum," "non-binding" or "inapposite") can the General Counsel seriously maintain that the findings of the Administrative Law Judge are in any way supported by the record. Due to space limitations, not every distortion, misstatement or falsehood can be addressed. Respondents will merely point out some of the more blatant and unsupportable contentions raised by the General Counsel.[2]

1. **The Demise of Tri-Messine was Not Speculative.** The General Counsel asserts that the subcontracting of work to Callahan was based "on nothing more than unproven speculation of what might have happened if it lost one specific customer – Consolidated Edison of New York ("Con Ed")" (GC Brief, p. 1). Yet the uncontroverted evidence was that of the $25 million in Tri-Messine's 2016 gross sales, Con Ed and the subcontracts related to Con Ed made up approximately 97% of the work. The additional 2-3% of Tri-Messine's work consisted of a

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[1] The General Counsel asserts that the Respondents did not except to the §8(a)(2) finding (GC Brief, p. 18, n. 14). This is not accurate. *See* Respondents' Exception No. 45.

[2] Significantly, the General Counsel devotes 22 pages trying to refute arguments it candidly admits the ALJ completely "disregarded" or "did not discuss" (GC Brief at pp. 19-41, 20). Moreover, it all but concedes that the ALJ's conclusion that Respondents did not prove that Con Edison would have enforced the Standard Terms & Conditions for Construction Contracts had it continued to use Local 175 labor, was without any basis. The General Counsel now meekly asserts that this finding by the ALJ was a "minor point and inconsequential" (GC Brief at 46). There was, of course, overwhelming testimony including written statements from Local 175 that Tri-Messine and other employers were being compelled to use only labor affiliated with the B&CTC in order to perform Con Edison work. Con Edison representatives testified to this and even the union testified that Tri-Messine had no choice. The failure to recognize such a fundamental part of the case demonstrates that the ALJ completely misunderstood or chose to ignore critical facts of this case. Tri-Messine either had to comply with the directives or go out of business.

very small number of clients (Tr. 71, 564, GC Ex. 5-a).[3] While the General Counsel may not be familiar with the paving industry, it strains credulity to argue that it is "speculative" as to what might happen to a company with such a loss in sales. It does not take an economist or accountant to understand that a 97% loss in sales (or anything close to that) destroys a business.[4]

Indeed, Local 175 itself had years earlier forecasted the demise of Tri-Messine and other Local 175 contractors based on the enforcement of the STCC. In its December 2014 filings before the Public Service Commission (Resp. Ex. 1), Local 175 argued that Con Ed's new policy made it "impossible for New York City contractors whose asphalt paver employees are represented by Local 175 to bid on the work, hundreds of asphalt pavers who are members of Local 175 will lose their jobs, because their employers will no longer be permitted to work on Con Edison contracts" (Resp. Ex. 1). The same argument was made by the union in its anti-trust action against Con Ed (Resp. Ex. 2). Even Local 175 leader Anthony Franco testified at the hearing that he knew a contract had to be signed with Local 1010 or Tri-Messine would be out of business. "I mean, you know, I couldn't expect the guy to lose his business." (Tr. 393). Local 175's attorney admitted that Tri-Messine would not have subcontracted the work unless it absolutely had to do so (Tr. 320). And Messina testified that if he did not get the Con Ed contact

[3] Rather than using Local 175 workers for this very small amount of work Messina candidly testified that he used 1010 workers. Four or five of his previously laid-off Tri-Messine employees came in to do this work (under 1010). These workers had not initially been able to secure work with a 1010 contractor. Once these former Tri-Messine employees were hired by Callahan, Messina was then able to utilize them for the more consistent 1010 Con Ed work he was performing (Tr. 506-07). In other words, they now had their "feet in the door." Again, the General Counsel argument that there were no restrictions on the kind of labor used for these customers (p. 14) shows that no good deed goes unpunished. Moreover it is nothing more of a distraction from the fact that that 97% of the work would have been lost had Callahan not performed the work. In addition, Messina testified that it was not feasible to perform the minimal non-Con Ed work unless it could be done in conjunction with the Con Ed work (Tr. 507-508).

[4] In an attempt to mitigate the severity faced by Tri-Messine, the General Counsel now suggests that the percentage of Con Ed work was only 87% because 10% of the work was for Con Ed subcontractors (GC Brief at p. 15, n. 12). The General Counsel conveniently leaves out the fact that Messina testified *without contradiction* that if the Con Ed work was lost, the subcontracting work would also disappear, *i.e.*, they were totally linked to one another (Tr. 564, 568, 504, 549). Michael Perrino of Con Ed confirmed that any construction work for Con Ed subcontractors had to be consistent with the Standard Terms & Conditions ("STCC") (Tr. 464). The General Counsel offered no evidence to contradict this evidence and its statements to the contrary are completely disingenuous.

he "would go out of business, and have to lay off 65 employees, some eight of them, nine of them were my family" (Tr. 563).[5] Apparently everyone but the General Counsel understood that this was not speculation but a complete loss of a business and unemployment for everyone.[6]

2. **The General Counsel Ignores the Testimony of Michael Perrino.** Michael Perrino, Section Manager for Con Ed, was subpoenaed to testify at the hearing by Local 175. The General Counsel briefly discusses an irrelevant portion of his testimony (GC Brief at pp. 4, 15, n. 11 and 47). It asserts that because in previous years Con Ed did not enforce the STCC, Respondents did not prove that they were being enforced going forward (GC Brief, p. 47). This is not only wrong but an obvious distortion of the testimony and evidence at the hearing. Indeed, the General Counsel contradicts itself when it later states that "Con Ed made it abundantly clear to [Messina] that it did not want Local 175 performing Con Ed work and that it wanted Respondent to sign with Local 1010" (GC Brief at p. 49).

The ALJ and General Counsel completely ignored Perrino's testimony that beginning in 2017 all new contracts needed to be performed by unions affiliated with the B&CTC. Perrino corroborated what everyone said Con Ed was telling its construction contractors in 2016 and 2017. He testified that he "explained to [Messina] . . . that Tri-Messine had to conform with – the [STCC] requirements" (Tr. 459). Likewise Messina testified that he was repeatedly told he

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[5] The General Counsel erroneously asserts that Messina "vaguely" testified that if he lost Con Ed he would go out of business (GC Brief, p. 15). There was nothing "vague" about Messina's testimony. Depending on the year, Con Ed and its subcontractor work varied from 93% to 99%. (Tr. 503, 544, 546; GC Ex. 5-a). Moreover the General Counsel issued subpoenas in this case and had in its possession extensive business records of Tri-Messine. No evidence was presented to support these rather illogical assertions.

[6] The General Counsel makes the peculiar argument that Tri-Messine was not guaranteed to win the Con Ed bid in the first place (GC Brief, p. 15). That is true and if Tri-Messine had not won the bid it would have been out of business nonetheless and all of its employees would have lost their jobs. (And of course there would have been no unfair labor practice charges, no contributions to the pension and welfare funds, etc.) Tri-Messine would not have been able to continue doing the tiny amount of non-Con Ed related work it had. As Messina testified "Like I said, our insurance bill – our general liability insurance bill is more than that [$500,000]" (Tr. 506). The suggestion that the business could continue to operate under these circumstances is absurd. Does the General Counsel maintain that Tri-Messine could continue to lease trucks, pay for truck yards, pay insurance bills and have its overall costs of running a business based on continuing to do a tiny fraction (3%) of its work?

needed to use labor affiliated with the B&CTC (Tr. 92, 95, 200, 519). He was even pulled out of a Christmas party in December 2016 and asked by Con Ed when he was going to sign a contract with a B&CTC union (Tr. 524). Con Ed "wanted to know if I was going to be able to be in compliance with the standard terms and conditions in order to be awarded the bid and if not, they were going to move on and award it to another contractor, the next lowest bidder" (Tr. 561).

3. **The General Counsel's Attempt to Interpret the Word "Qualified" is Unavailing**. The General Counsel quotes extensively from the "long time attorney for Local 175, Eric Chaikin" (GC Brief, p. 17). It, however, ignores the fact that Mr. Chaikin played no role in the negotiations of the contract (Tr. 305). Regardless of counsel's abilities, the fact remains that the term "qualified" is easily understood by lawyers and laypersons. The General Counsel claims that the intent of the parties in negotiating the language should be considered. (GC Brief, p. 30). Does the General Counsel maintain that the parties intended the contract to cover work that the employees would not be able to perform? What business would sign a contract to pay employees knowing they could not perform the work for its largest customer?

The General Counsel maintains that the Respondents' definition of qualified "is unreasonable and completely illogical" (GC Brief, p. 30). Yet the General Counsel's 70-page submission completely ignores the fact that definition offered by Respondents is taken from several respected dictionaries which define "qualified" by using terms such as "eligible" or "having met conditions and requirements" These are hardly unreasonable or illogical interpretations. The suggestion that the word "qualified" is limited solely to abilities is sheer conjecture by the General Counsel and in any case Local 175 workers were not "able" to perform the work once the STCC were enforced. Further the General Counsel's assertion that the interpretation is not based on any past practice is meaningless. The absence of a past practice does not change the clear making of a word. Indeed, while the General Counsel asserts that the

court decisions cited by Respondents in their initial brief (Resp. Memo, pp. 35-36) using the word "qualified" are inapposite, it provides no authority to counter the principle that "words are to be given their ordinary meaning." *American Flint Glass Workers' Union*, 133 NLRB 296, 304 (1961). An entire Section (Article VII, Section 2) on "qualifications" is deliberately included in the contract. It cannot and should not be ignored or be considered superfluous.

Should Messina have just ignored these demands and hoped as the General Counsel seems to suggest that Con Ed would not enforce it? How could this be done when it is undisputed that Con Ed insisted that Messina sign a contract with a B&CTC union *before* being awarded the contract? (Tr., 523; GC Ex. 9, p. 2).

4. **Caselaw Supports Respondents' Termination of the Agreement.** In its initial brief Respondents cited several court and Board decisions to support the view that as of June 30, 2017, Tri-Messine (a) had no obligation to continue its relationship with Local 175; and/or (b) was not required to make contribution to the Local 175 Funds. In its brief, the General Counsel acknowledges these decisions but claims that they are either non-binding, distinguishable or dicta. The General Counsel claims that Respondents "cherry picked" (GC Brief, p. 23) the line in *Derrico v. Sheehan Emergency Hosp.*, 844 F.2d 22, 26-27 (2d Cir. 1988), that "rights and duties under a collective bargaining agreement do not otherwise survive the contract's termination at an agreed expiration date" (GC Brief, p. 23) but admit that the Court in *"Automatic" Sprinkler Corp. of Am. v. NLRB*, 120 F.3d 612 (6th Cir. 1997), cited this very principle in support of its decision (GC Brief, p. 25). It claims that reliance on *"Automatic" Sprinkler* is "flawed" and that in any case it is distinguishable because the decision therein centered on a "contracting issue" (GC Brief, p. 25). That claim, even if true, is a distinction without as difference. The Court squarely held (as opposed to the General Counsel's claim of *dictum*), that the contracts had "terminated, rather than merely expired, upon their respective

expiration dates, and because the agreements did not provide otherwise, Petitioners were relinquished of any contractual or statutory obligations to the unions." 120 F.3d at 619.

The General Counsel also jumps through hoops to try and distinguish the Courts' decisions in *New York News, Inc. v. Newspaper Guild of New York*, 927 F.2d 82 (2d Cir. 1991) and *Int'l Bhd. of Elec. Workers, Local 26 v. Advin Elec., Inc.*, 98 F.3d 161, 164-65 (4th Cir. 1996). The General Counsel erroneously asserts that "[n]either the District Court nor the Second Circuit in *New York News* ruled on what such termination meant for the parties collective bargaining relationship" (GC Brief at p. 27). This is simply untrue. The Second Circuit plainly stated that the employer, which was a party to a contract that contained a similar termination as the one contained herein, had every right to walk away from the union upon the termination of the agreement. 927 F.2d at 84. The General Counsel's attempt to distinguish *New York News* is unavailing at best. Moreover, its attempts to distinguish Board law are also fruitless. For example, the contract in *Cauthorne Trucking*, 256 NLRB 721 (1981), contained a provision that allowed the employer to "terminate contributions to the Pension Trust Agreement." Likewise the contract here allowed Tri-Messine to terminate the agreement upon proper notice – notice that was undisputedly received. Similarly even without a writing the Board found that the union and employer had a verbal agreement to walk away from one another. *See Senator Theater*, 277 NLRB 1642 (1984). Here, there is an explicit written agreement signed by both parties authorizing either one to terminate the relationship at the end of the term. Moreover, *Cauthorne* was favorably cited by the Board for the proposition that "an employer . . . may preemptively bargain for language in a collective-bargaining agreement that would permit it to take unilateral action with respect to specific terms and conditions of employment after the agreement expires." *Raytheon Network Centric Sys.*, 365 NLRB No. 161, n. 98 (2017). Further, in *Oak Harbor Freight Lines*, 358 NLRB 328 (2012), the Board found a waiver where the union "agreed to and

signed" language providing that the employer could cancel its pension obligations upon the expiration of the collective bargaining agreement by written notification to the union and the fund. Indeed "a union's waiver need not be stated with "lawyerly perfection." *Staffco of Brooklyn*, LLC, 364 NLRB No. 102 at p. 3. Thus, even if the waiver is not viewed as a complete waiver of all obligations, there is no reason why the pension and welfare contributions herein need to have been continued in light of the clear and unmistakable waiver by the union.[7]

The General Counsel inappropriately cites language from the Board's *dissenting opinion* in *Hacienda Hotel*, 351 NLRB 504, 507 (2007) (GC Mem., p. 29). The majority opinion in *Hacienda* actually supports the Respondents' position, *i.e.*, in that case a provision was deemed to have terminated based on language that said it continued only for the duration of the contract.[8]

5. **The Doctrine of Impossibility Supports Respondents' Actions.** The General Counsel conflates the argument that it was impossible for Local 175 to perform the work with the claim of exigent circumstances. Moreover, without any support whatsoever it argues that "Board law does not recognize the doctrine of impossibility as a complete defense to an 8(a)(5) contract repudiation and the ALJ properly disregarded this argument" (GC Brief, p. 35). No authority is provided to support this sweeping assertion. Further, its attempt to distinguish *Associated Musicians of Greater New York*, 176 NLRB 365 (1969), by claiming it was not a §8(a)(5) case is baseless. No such distinction is mentioned. Moreover, as here, the facts in that case were unique which led to the conclusion that "the law of labor relations should provide an

[7] It is, of course, significant that the contract provided the parties various options at the end of the agreement. A party could (a) terminate the agreement; (b) not negotiate and simply allow the contract to renew for one year; or (3) submit proposals to amend the agreement. Here, Tri-Messine chose option (a) – to terminate the agreement.

[8] The General Counsel also cites *Kirkpatrick Electric Co., Inc.*, 314 NLRB 1047 (1994), in support of its claim that the termination language does not end Tri-Messine's obligations. In *Kirkpatrick Electric*, however, the employer failed to provide proper notice of termination. Thus the contract renewed. Moreover, the notice sent by the employer was a statement that it did not intend to renew. It never clearly stated it would *terminate* the agreement. Finally, the ALJ's decision was not entirely adopted by the Board. In fact the Board specifically disavowed the ALJ's decision concerning the employer's bargaining duty and specifically noted that "the bargaining relationship, once lawfully terminated, does not persist inchoate." *Id.* at 1047, n. 2.

employer with some equivalent measure of flexibility in such extreme and unusual circumstances as are presented here." *Id.* at 367. The same flexibility should be offered here.[9]

6. **Tri-Messine and Callahan are Not Alter Egos.** The General Counsel does not cite one case finding an alter ego when the original employer was incapable of performing the work in question. Nevertheless, it does admit that Callahan was created so that the Con Ed work could be performed (GC Brief, p. 46). The Board's decision in *Island Architectural Woodwork, Inc.*, 364 NLRB No. 73 (2016), contrary to the General Counsel's assertions, is inapposite. In that case the employer decided *on its own* to create a new company to perform the work more efficiently. The customer never directed Island to use any specific kind of labor. Here, Con Ed directed all construction contractors working on future contracts must use B&CTC labor only.

The General Counsel claims that the alter ego court decisions cited in Respondents' initial brief (Resp. Brief pp. 46-48) are ERISA and not Board decisions and should not be considered. But the alter ego doctrine is one of equity. *Joe Costa Trucking*, 238 NLRB 1516, 1523 (1979). How can employer be punished for doing something that saved the jobs of 65 employees? Incredibly the General Counsel again misstates the record when it asserts that "[n]ot only did Tri-Messine fire all forty-four of its workers, but the few that returned to work for Callahan had to forgo their Local 175 membership altogether and join different unions" (GC Brief p. 50) (emphasis added). Every one of the Tri-Messine employees who wanted to work for Callahan returned to work within several months. (GC Ex. 12 and Resp. Initial Brief, p. 67. n. 29). Had Tri-Messine not subcontracted the work to Callahan *everyone* would have lost their jobs and no contributions would have been made to the Funds. How can this be "equitable?"

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[9] Of course it is ironic that even the Charging Party understood the *impossibility* faced by Tri-Messine and other contractors when it candidly admitted that Con Ed's new policy made it "*impossible* for New York City contractors whose asphalt paver employees are represented by Local 175 to bid on the work, hundreds of asphalt pavers who are members of Local 175 will lose their jobs, because their employers will no longer be permitted to work on Con Edison contracts" (Resp. Ex. 1, pp. 5-6 emphasis added).

7. **Tri-Messine Properly Subcontracted the Work to Callahan.** The General Counsel maintains that the work was not subcontracted. This is incorrect and in any case, misses the point. The decision to allow Callahan to perform the work – work which Tri-Messine could not do – was an entrepreneurial decision not amenable to the collective bargaining process. There was no sham here. The only sham is the General Counsel's unwillingness to recognize the fact that a business could not do the work it had been doing in prior years. *See Louisiana-Pacific Corp.*, 256 NLRB 796, n. 1 (1981) (subcontracting permitted when employees not qualified to perform the work). Rather than walk away and leave employees with no jobs or benefits, the work was subcontracted so Callahan could enter into a labor contract that met Con Ed's STCC.

8. **Tri-Messine Satisfied its Obligation to Bargain.** In an attempt to downplay Respondents' willingness to meet with the union and support their claim of failure to bargain, the General Counsel inaccurately describes the scheduled January 13, 2017 meeting by claiming that "the parties subsequently agreed to meet without attorneys" (GC Brief, p. 10). This is not true. Counsel for Respondents, after being contacted by union counsel, agreed to meet on January 13 (with clients *and* counsel). The union did not show and did not even call to cancel. Only after chasing down the union did Respondents learn that Local 175 unilaterally decided that it would not meet with attorneys. "I just spoke with Roland who contacted Anthony Franco and was told there is no need to have a meeting with the attorneys" (GC Exs. 12, 22). Thus, at the same time it is pursuing a refusal to bargain charge, the General Counsel ignores the fact that Respondents offered to meet but the union declined.

Moreover, the meeting had been scheduled immediately after Callahan unsuccessfully tried to get all of Tri-Messine's employees to work directly for Callahan. Messina had tried to convince 1010 to allow thee employees to bypass the hiring hall even offering to pay them above

the contract rate. Local 1010 refused as evidenced by the January 6, 2017 e-mails (GC Ex. 10). Franco was made aware of this just days later and he admittedly made no request to bargain.

The General Counsel makes much of the fact that Callahan was formed in November 2016 and signed a contract with 1010 on January 13, 2017. This, of course, ignores the fact that Con Ed was directing Messina to sign an agreement with a B&CTC union *before* the contract would be awarded. (GC Ex. 9; Tr. 523, 524). There was no choice. Still, the work was not subcontracted to Callahan until March 6, 2017 — almost two months later. Franco never asked to meet with Messina during this time period. Indeed Messina even stated that if something could be worked out in this interim period, the work would not be subcontracted to Callahan (Tr. 239-40). Thus, for weeks Local 175 had the opportunity to meet with Messina. Local 175 continued to perform work until March 6, 2017 when the work on the prior Con Ed contract was completed and the new tickets were issued for the 2017 Con Ed contract.

9. **The Remedy is Punitive.** The proposed remedy is punitive. The contributions the General Counsel seeks would never have been made if Tri-Messine insisted on using Local 175 workers. Con Ed would not have awarded Tri-Messine the contract and its business would have closed. By subcontracting the work to Callahan, employees kept their jobs and benefits. Rewarding the Funds with payments it never would have received in the first place is punitive.

CONCLUSION

The decision of the ALJ should be reversed and the complaint dismissed in its entirety.

Dated: Garden City, New York
February 22, 2019

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CERTIFICATE OF SERVICE

I certify that on this 22nd day of February, 2019 I caused the foregoing to be electronically filed with the National Labor Relations Board at http://nlrb.gov and a copy of same to be served by e-mail on the following parties of record.

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